IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.7.2007

Coram:

The Honourable Mr.Justice M.JAICHANDREN

S.A.No.1476 of 1996

N.Boraiah .. Appellant/Plaintiff

vs.

1. Pandurangan
2. K.Jayaraman .. Respondents/Defendants

The Second Appeal has been filed against the judgment and decree, dated 23.4.1996, passed in A.S.No.52 of 1995, on the file of the Subordinate Judge, Ootacamund, the Nilgiris District, confirming the judgment and decree, dated 30.11.1994, passed in O.S.No.515 of 1991, on the file of the District Munsif, Ootacamund, The Niligris District.

For Appellant : Mr.S.K.Rakhunathan

For Respondents : Mr.N.Anantharaju

J U D G E M E N T

The Second Appeal has been filed against the judgment and decree, dated 23.4.1996, passed in A.S.No.52 of 1995, on the file of the Subordinate Court, at Ootacamund, The Nilgiris District confirming the judgment and decree, dated 30.11.1994, passed in O.S.No.515 of 1991, on the file of the District Munsif Court at Ootacamund, The Nilgiris District.

2. The plaintiff in the suit O.S.No.515 of 1991, is the appellant in the present second appeal. The plaintiff had filed the suit before the District Munsif Court at Ootacamund, The Nilgiris District, praying for the reliefs of declaration, mandatory injunction and for permanent injunction.

3. The brief facts of the case, as stated by the plaintiff, are as follows:

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The plaintiff is the owner of the building named as Reliance Building, measuring 0.18-6/16 acres in R.S.No.1752. The plaintiff had demolished some of the buildings which had been there and had constructed the said building in the property. The eastern boundary of the said property is the lands in R.S.Nos.1750/1 and 1750/2. The Government had assigned the lands in 1750/2 to the Co-operative Printing Works. On the eastern portion of R.S.No.1750/1, the defendants are running a Petrol Bunk. In R.S.No.1752, there was a passage about 20 feet in width which gives access to the plaintiff's house and land. The said passage has been marked as "ABCD" in the sketch annexed to the plaint filed in O.S.No.515 of 1991. The plaintiff has been using the said passage for about 65 years. The plaintiff has prescriptive rights over the passage. Since the persons having the Co-operative Press had attempted to block the said passage, the plaintiff had filed a suit in O.S.No.54 of 1986, which had been dismissed. Therefore, the plaintiff had filed an appeal in A.S.No.28 of 1989, which is pending before the District Court, Ootacamund. Even though the defendants have no right in the suit property, on 12.6.1991, they have constructed a foundation in the suit property. Since the plaintiff had gone to Australia, he came to know about the facts only after his return. Thereafter, the plaintiff had filed the suit in O.S.No.515 of 1991.

4. The averments made in the written statement filed by the second defendant, which had been adopted by the first defendant, are as follows:

It has been stated that the suit is not maintainable in law or on facts. The plaintiff's title in the suit property is denied. Since the plaintiff has not made his brothers as parties to the suit, it is defective. The suit filed by the plaintiff against the second defendant had been dismissed. Since the Government had leased the said land to Bharath Petroleum Corporation, the said concern is a necessary party to the suit. The claim of the plaintiff that he has prescriptive rights in the passage is imaginary. The plaintiff is not entitled to claim any right in the passage belonging to the Government. The suit does not have any cause of action. The amount paid as Court Fee for the filing of the suit is incorrect. Therefore, the suit is to be dismissed.

5. Based on the averments made in the plaint as well as in the written statement, the trial Court had framed the following issues for consideration:-

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"1. Whether the averment of the plaintiff that the plaintiff and his tenants have prescriptive rights over the suit pathway is correct?

2. Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for?

3. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

4. What other reliefs the plaintiff is entitled to?"

6. The additional issue was framed by the trial Court, on 28.11.1994, which is as follows:

"Whether the suit is barred by the non-joinder of necessary parties?"

7. The trial Court, by its judgment and decree, dated 30.11.1994, had dismissed the suit holding that the plaintiff is not entitled to the reliefs prayed for in the suit. Even though the plaintiff had claimed that he has prescriptive rights over the suit passage, he could not prove that he had been using the suit passage for more than 60 years as required by law.

8. The trial Court had also found that there is no dispute amongst the parties to the suit that R.S.Nos.1057/1 and 1057/2 belonged to the Government. It is also not in dispute that the suit passage over which the plaintiff claims prescriptive right is on the property belonging to the Government. While so, the burden of proof is on the plaintiff to show that he and his men have been using the suit passage for over 60 years to establish their right of using it by prescriptive right. The oral evidence let in on behalf of the plaintiff does not substantiate the claim of the plaintiff that he and his men were using the passage continuously for over 60 years. Further, there is no documentary evidence filed on behalf of the plaintiff to prove the same.

9. The trial Court had also found that the plaintiff had filed another suit in O.S.No.54 of 1986, with regard to the same passage and had lost the suit. The plaintiff had also lost the appeal filed against the judgment and decree made in O.S.No.54 of 1986. A second appeal filed against the judgment and decree passed by the Courts below is pending before this Court in S.A.No.755 of 1994. Even according to the admissions of the plaintiff, he has an alternate way to reach the building from his property, even though the said pathway cannot be used by cars, lorries and other such vehicles.

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10. Further, according to the oral evidence of D.W.1, it has been stated that the wall in question has been built in the year, 1991, by the Bharath Petroleum Corporation and that he does not know as to whether it was built with or without the permission of the Government or Municipality. However, the trial Court had found that it was unnecessary to go into the issue as to whether the wall was built with or without the permission of the concerned authorities, since the plaintiff could not prove that he had prescriptive rights to use the suit passage as claimed by him in the suit in O.S.No.515 of 1991.

11. With regard to the additional issue framed by the trial Court, it had been found that the suit filed by the plaintiff is bad in law for non-joinder of necessary parties, namely, the Government and Bharath Petroleum Corporation, since the property in Survey No.1750/1 in which the suit passage is situated belongs to the Government and the said property has been leased out to Bharath Petroleum Corporation.

12. Aggrieved by the judgement and decree of the trial Court, dated 30.11.1994, made in O.S.No.515 of 1991, the plaintiff had filed an appeal in A.S.No.52 of 1995 on the file of the Subordinate Court at Ootacamund, The Nilgiris District.

13. The lower appellate Court had framed the point for consideration as to whether the appeal is to be allowed or not?

14. The lower appellate Court had found that there is no dispute regarding the fact that the property in Survey No.1752 at Ootacamund belongs to the plaintiff and that the Survey Nos.1750/1 and 1750/2 belonged to the Government. The Survey No.1750/2 had been allotted by the Government to the Co-operative printing press and that the plaintiff had filed a suit with regard to the suit passage in O.S.No.54 of 1986, before the District Munsif Court at Ootacamund, The Nilgiris District and since the suit had been dismissed, the plaintiff had preferred an appeal in A.S.No.28 of 1989, on the file of the District Court at Ootacamund, The Nilgiris District, which had also been dismissed. Thereafter, the plaintiff had preferred the appeal in S.A.No.755 of 1994, which is pending before the High Court of Judicature at Madras. The plaintiff had admitted that the earlier suit filed by him in O.S.No.54 of 1986, also relates to the same suit property, as it is in O.S.No.515 of 1991, regarding which the present second appeal had been filed in S.A.No.1476 of 1996. The lower appellate Court had found that survey Nos.1750/1 and 1750/2 are joint properties belonging to the Government. It had also been found that the land in Survey No.1750/1 had been given on lease to Bharat Petroleum Corporation.

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15. The Village Administrative Officer, who had been examined as D.W.2, had stated in his evidence that there is no pathway in survey No.1750/1. ABCD pathway shown in the sketch filed along with the plaint in the suit O.S.No.515 of 1991, shows that it is in survey No.1750/1.

16. In such circumstances, the Government is a necessary party to the suit and Bharath Petroleum Corporation, which is a lessee in the said property, is also a necessary party to the suit. The plaintiff has not stated any reason for not making the Government and Bharath Petroleum Corporation as parties to the suit. However, the lower appellate Court had found that it is sufficient, for the plaintiff to prove that he was in prescriptive use of the passage for 30 years or more to claim the relief against the Government.

17. Therefore, the conclusion of the trial Court that the plaintiff had to prove that he had used the suit passage for more than 60 years to claim prescriptive rights in the same is incorrect. The lower appellate Court had also found that there is no mention of the existence of the passage as claimed by the plaintiff in Survey No.1750/1. There is no mention in Exhibits B.1 and B.2 about the existence of the passage in Survey No.1750/1 as claimed by the plaintiff. D.W.2 had also stated in his evidence that there is no pathway in Survey No.1750/1 according to Exhibit B.1.

18. The lower appellate Court had, therefore, found that the claim of the plaintiff that there is a pathway in Survey No.1750/1 on which he got prescriptive rights is not sustainable. Further, since the plaintiff had filed the suit in O.S.No.54 of 1986, making a similar claim and having lost the same cannot get the relief as prayed for in the present suit in O.S.No.515 of 1991.

19. Being aggrieved by the judgment and decree of the lower appellate Court, dated 23.4.1996, made in A.S.No.52 of 1995, the plaintiff had filed the present second appeal in S.A.No.1476 of 1996.

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20. This Court had admitted the second appeal on the following substantial question of law:

> "On the facts and circumstances is not the plaintiff entitled to the decree on the basis of prescription, the appellant using the Road-way continuously for over the statutory period?"

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21. The appellant had raised various grounds in filing the second appeal before this Court contending, inter alia, that the Courts below had failed to note that the plaintiff and his predecessor-in-interest having used the suit schedule pathway for over 65 years had acquired prescriptive title over the suit property. The Courts below had failed to note that the appellant is entitled to use the suit pathway, even though there may be an alternate way to reach the plaintiff's property. Since the plaintiff had proved that there is no easy access to the plaintiff's property except through the suit pathway, the Courts below ought to have accepted the claim of the plaintiff to use the suit pathway by easement of necessity.

22. Having heard the learned counsels appearing on behalf of the parties concerned and on a perusal of the records available, this Court is of the considered view that the plaintiff has not shown or proved sufficient reasons to interfere with the findings of the Courts below.

23. It is clear that the Courts below have come to the right conclusion that the plaintiff has not proved his right to use the suit pathway in S.F.No.1750/1 due to prescriptive rights, by showing that he has been using the said pathway for more than the required number of years. The Courts below have rightly held that the suit is bad in law for non-joinder of necessary parties, namely, the Government and Bharath Petroleum Corporation.

24. The Courts below have also taken into consideration the fact that the plaintiff had lost a similar claim made in O.S.No.54 of 1986, on the file of the District Munsif Court, The Nilgiris District, at Ootacamund. In such circumstances, the judgment and decree of the District Munsif Court, The Nilgiris District, at Ootacamund, dated 30.11.1994, made in O.S.No.515 of 1991, as confirmed by the judgment and decree of the Subordinate Court, The Nilgiris District at Ootacamund, dated 23.4.1996, made in A.S.No.52 of 1995, cannot be interfered with by this Court in the present second appeal. Hence, the second appeal stands dismissed confirming the judgment and decree of the Courts below. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Subordinate Judge, Ootacamund,
The Nilgiris District.

2. The District Munsif, Ootacamund,
The Nilgiris District.

3. The Record Keeper,
VR Section, High Court, Madras.

+ 1 cc to Mr. Anantharaju, Advocate SR no. 44663

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